

1 **JOAQUIN C. ARRIOLA**
2 **MARK E. COWAN**
3 **ARRIOLA, COWAN & ARRIOLA**
4 259 Martyr Street, Suite 201
5 P.O. Box X, Hagåtña, Guam 96932
6 Telephone: (671) 477-9730/33
7 Telecopier: (671) 477-9734

FILED
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District Court

JUN 26 2006

For The Northern Mariana Islands
By _____
(Deputy Clerk)

8 **VICTORINO D.L.G. TORRES**
9 **VINCENT D.L.G. TORRES**
10 **TORRES BROTHERS, P.C.**
11 P.O. Box 501856
12 Saipan, NMI 96950
13 Telephone: (670) 233-5504/6
14 Telecopier: (670) 233-5510

15 Attorneys for **BANK OF GUAM**

16 IN THE UNITED STATES DISTRICT COURT FOR
17 THE NORTHERN MARIANA ISLANDS

18 ROSARIO DLG KUMAGAI,) CIVIL ACTION NO. 05-0037

19 Plaintiff,)

20 vs.)

21 PAMELA BROWN, a.k.a. PAMELA BROWN)

22 BLACKBURN, personally and in her official)
23 capacity as the Attorney General for the)

24 Commonwealth of the Northern Mariana Islands;)

25 PERMIN M. ATALIG, personally and in his)
26 official capacity as the Secretary of Finance,)

27 COMMONWEALTH OF THE NORTHERN)
28 MARIANA ISLANDS;)

29 MARIA LOURDES SEMAN ADA, personally)
30 and in her official capacity as the Executive)
31 Director for the Commonwealth Development)

32 Authority;)

33 COMMONWEALTH DEVELOPMENT)
34 AUTHORITY;)

35 BANK OF GUAM;)

36 and JOHN DOES ONE thru TEN,)

37 Defendants.)

)
DEFENDANT BANK OF GUAM'S
REPLY TO PLAINTIFF KUMAGAI'S
OPPOSITION TO BANK OF GUAM'S
MOTION FOR SUMMARY
JUDGMENT

Hearing: July 20, 2006

Time: 9:00 AM

Judge: Hon. Alex R. Munson

1 **I. The facts in this action are not in material dispute and the Bank
2 is entitled to Summary Judgment.**

3 Kumagai's opposition contains numerous characterizations as to the Bank's purported
4 motive, intent, or joinder with other parties in deliberate action unsupported by evidence. For
5 example, on page 12, Kumagai asserts the Bank "willfully participated" and "acted in concert" with
6 other Defendants in "an attempt to deprive Plaintiff of her right to her property". At page 15, she
7 states that the Bank shared a "meeting of the minds" to deny Plaintiff a right to property. Plaintiff
8 furnishes no evidence to support these and similar characterizations.¹ Much of Plaintiff's Complaint
9 against the Bank was based on conclusory allegations of conspiracy. Plaintiff has offered no specific
10 evidence of conspiracy. The Declaration of Amoretta Carlson, ¶¶6-8, 12-14, 19, shows that the Bank
11 had no involvement in any of the matters alleged in the Complaint prior to the Bank's initial receipt
12 of the requisition for payment to Plaintiff, and that it withheld processing solely motivated by a
13 desire to comply with what it believed to be a valid instruction of CDA.

14 It is respectfully submitted that the Bank is entitled to summary judgment on both the federal
15 and state claims asserted against it. In this Court's decisions entered on May 18, 2006 granting the
16 motions to dismiss of the other Defendants, the Court concluded that Plaintiff had failed to state
17 claims of constitutional violation. Those decisions logically support disposition of the federal claims
18 as to the Bank, as do the alternate grounds for summary judgment on those claims submitted by the
19 Bank, including that the Bank was not a state actor, was not the proximate cause of the injuries
20 Plaintiff suffered, and is entitled to either a good faith or qualified immunity defense to the federal
21

22

23 ¹Similarly Kumagai asserts on page 5 of her Opposition that the Bank "knew or should have known
24 that it had previously issued compensation to other individuals similarly situated". The statement has no
25 factual support and is contradicted by the Declaration of Amoretta Carlson, ¶¶14-18, demonstrating that the
26 Bank did not have information showing the wetland or non-wetland classification of properties being paid.
27 On the same page, Plaintiff without evidentiary support reiterates an allegation previously made that
28 compensation was paid to another wetland owner during the pendency of the MPLA lawsuit. This also is
contradicted by the Carlson Declaration, ¶¶14-17.

claims.²

The Court dismissed the Section 1985(3) conspiracy claim as to Defendants Brown and CDA with leave to amend, and the other federal claims as those Defendants without prejudice. The Court dismissed the federal claims as to Ada and CDA without granting leave to amend, or stating the dismissal was without prejudice, accordingly those dismissals may be construed as with prejudice. U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220 at 241-242 (1st Cir. 2004), Wagh v. Metris Direct, Inc., 348 F.3d 1102 at 1113 (9th Cir. 2003), Stewart v. U.S. Bancorp, 297 F.3d 953 at 957 (9th Cir. 2002).

Unlike the case with the other Defendants, the Bank's motion is a motion for summary judgment not a motion to dismiss for failure to state a claim under Rule 12(b)(6). Taking into account the lack of evidence submitted by Plaintiff supporting her claims in response to the Bank's Motion, Summary Judgment should be granted to the Bank. The evidence shows that the Bank was situated differently to the other Defendants in simply acting upon an instruction from the CDA not, as may be the case with at least some of the other Defendants herein, initiating the sequence of events which are the basis of Plaintiff's claims.

The Bank respectfully submits that the Court may also consider and grant summary judgment upon Plaintiff's local law claims. The Court dismissed those claims as to the other Defendants without prejudice, apparently pursuant to its discretion under 28 USC §1367, which provides in part:

(a) ... in any civil action of which the district courts have original

²On the issue of constitutional violation the Bank of Guam essentially adopted the arguments made by the other Defendants in support of their motions to dismiss. See, Bank's Memorandum, pp.16-17. Kumagai in her Opposition Memorandum similarly incorporated her prior responses on the constitutional issue in those motions. Opposition Memorandum, pp.15-16. Kumagai appears additionally to argue a property interest in her settlement agreement with the former MPLA. However, this is not a new argument as was raised in Kumagai's Memorandum in Opposition to CDA's Motion to Dismiss, filed January 17, 2006, p.4, fn1.

1 jurisdiction, the district courts shall have supplemental jurisdiction
2 over all other claims that are so related to claims in the action within
3 such original jurisdiction that they form part of the same case or
4 controversy under Article III of the United States Constitution. Such
supplemental jurisdiction shall include claims that involve the joinder
or intervention of additional parties.

5 (c) The district courts may decline to exercise supplemental
6 jurisdiction over a claim under subsection (a) if -- ... (3) the district
7 court has dismissed all claims over which it has original jurisdiction.

8 Grant of summary judgment to the Bank on the federal claims would not preclude the Court
9 from granting summary judgment on the state law claims asserted against the Bank. Common facts
10 underlie both the federal and state claims. The local law claims do not involve novel issues of law.
11 In similar circumstances courts in disposing of federal claims on summary judgment have also
12 disposed of state law claims, rather than declining jurisdiction. Lowe v. Unifi, Inc., 292 F.Supp.2d
13 773 at 789-791 (M.D.N.C., 2003), Heideman v. Wirsing, 840 F.Supp. 1285 at 1302-1303 (W.D.
14 Wis., 1992), Ivy v. Kimbrough, 115 F.3d 550 at 557-553 (8th Cir., 1997), Thurman v. City of Lake
15 St. Louis, 24 F.3d 1034 (8th Cir., 1994).

16 In considering whether to dismiss the local claims, the Court should consider conservation
17 of judicial energy and the avoidance of multiplicity of litigation. Fralin v. County of Bucks, 296
18 F.Supp.2d 609 (E.D. Penn., 2003). Here as the federal and state claims arise out of the same facts
19 it would not suit judicial economy to have the claims, to the extent not disposed of on the merits,
20 pursued as to the Bank in different courts or pursued as to the Bank and other parties in different
21 courts.³

22 Also, to the extent the Court has not dismissed on the merits all federal claims against all
23 Defendants, it is respectfully submitted that the Court has not yet "dismissed all claims over which

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25 ³Here, as in Heideman v. Wirsing, the federal and state claims are "simply different legal
26 approaches to the same set of allegations." 840 F.Supp. 1285 at 1303.

1 it had original jurisdiction." A dismissal without prejudice is normally viewed as not final or
2 appealable, Montano v. City of Chicago, 375 F.3d 593 at 597 (7th Cir. 2004).⁴ Ordinarily courts
3 declining to exercise supplemental jurisdiction over state law claims after disposition of federal
4 claims do so when the federal claims have all been disposed of by summary judgment or with
5 prejudice. See, e.g., Phillips v. Bailey, 337 F.Supp.2d 804 at 805 (W.D. Va., 2004), Cox v. Maine
6 State Police, 324 F.Supp.2d 128 at 135 (D.Me., 2004). Compare Eralin v. County of Bucks, 296
7 F.Supp.2d 609 (E.D. Pa., 2003), White v. Union Pacific R.R., 805 F.Supp. 883 at 890 (Kan., 1992),
8 (state law claims not dismissed where some federal claims still viable notwithstanding grant of
9 summary judgment on other federal claims).

10 **II. Kumagai Is Not a Trust Beneficiary.**

11 The Trust in this case was created by the Indenture. Kumagai does not controvert the Bank's
12 analysis of the Indenture as to CDA's authority under the Indenture, nor the analysis and authorities
13 cited by the Bank showing that under the Indenture Plaintiff is not a beneficiary. Instead, Kumagai
14 argues that the provisions of the Indenture are contrary to law.
15

16 Kumagai cites no judicial or other determination in effect at the time of the events at issue
17 or to date that the Indenture in either respect is contrary to law. In Commonwealth v. Demapan-
18 Castro, Civil Action 04-0563, cited in the Bank's Memorandum, p.17, the Court clearly held the
19 Attorney General had authority to question the legality of disbursements by MPLA from the bond
20 proceeds at issue here, and stated that CDA authorization for a disbursement was necessary.
21 Although characterizing that statement as dicta, Kumagai cites no contrary precedent supporting her
22 contention.

23 Contrary to the statement at page 11 of Kumagai's Opposition, it was Kumagai not Plaintiff

24

25 ⁴The decisions as to the other Defendants are also, at least at this point, not yet final under FRCP 54
26 and 58.

1 that had the opportunity to challenge the legality of CDA's action, and of the Indenture, in the MPLA
2 action since Kumagai, not the Bank, was a party in that action. The Court's statement in Demapan-
3 Castro that CDA's approval is necessary for disbursement reflects the understanding of all parties
4 in interest as to CDA's authority. While MPLA did not include or refer to CDA in its Agreement
5 on Land Compensation Draw Down and Disbursement Procedures, Complaint, Ex.C, it processed
6 all but one requisition through CDA. Carlson Declaration, ¶4. CDA and the Attorney General
7 entered into their agreement that CDA would not approve the requisition (Complaint, Ex.S) without
8 the Bank, and the Attorney General did not join the Bank as a defendant in the MPLA case, or in
9 Demapan-Castro nor did any party seek to compel the Bank's joinder, reflecting the view that the
10 Bank had no independent authority to act on a requisition without CDA concurrence.⁵

11 As Defendant CDA has pointed out in its Reply filed January 26, 2006, at p.7, the history of
12 amendments to P.L. 13-17, shows that P.L. 13-56 was to restrict authority of MPLA over the Bond
13 proceeds as under earlier versions of the legislation, the Bond proceeds would have been paid to and
14 held by MPLA giving MPLA unrestricted practical control over the funds. The language first
15 included in P.L. 13-56, and reiterated in P.L. 14-29, diminished MPLA control by requiring funds
16 to be held by the CDA appointed Trustee. See, also letter of Governor Babauta signing into law P.L.
17 14-29, Complaint, Ex.B, pp.2-3. The legislation caused checks on the government's use of its own
18 money, not a trust enforceable directly by third parties. The statement in P.L. 13-56, Section 5, that

19 _____
20 ⁵The Bank's obligations under the Indenture were to the Bondholders and the Commonwealth not
21 third parties challenging the Indenture. In addition to the provisions of the Indenture protecting the Trustee
22 from third party claims, P.L. 11-3, Section 16, 4 CMC §10466, contains provisions designed to protect bonds
23 from legal challenge. The Indenture contains on page 1 a recital of compliance with those conditions with
24 those conditions and with law in issuance of the Bonds, which pursuant to Section 10466 is "conclusive
25 evidence of their validity and the regularity of their issuance". In light of those provisions as well as its
26 obligations to the Commonwealth it would be inappropriate for the Bank to have acted upon the Indenture
27 other than as written, or to respond to a third party demand or claim of illegality until such claim of illegality
28 was established in a timely and appropriate proceeding.

1 "the trust funds and earnings hereof are hereby continuously appropriated solely for the purpose of
2 paying out land compensation claims subject to conditions necessary to maintain tax exemption of
3 the bonds ..." is a statement as to how the Commonwealth shall use its own funds, not the creation
4 of a trust enforceable directly by specific landowners against the Trustee.
5

6 P.L. 13-56 provided for the land compensation proceeds to be held by the "CDA appointed
7 trustee", and the borrowing was specifically made a borrowing pursuant to P.L. 11-3, under which,
8 as described in the Bank's Memorandum at pp. 2-3, 7-8, CDA represents the Commonwealth in the
9 issuance of the Bonds. It is consistent with P.L. 13-17, as amended, taking into account the
10 provisions of P.L. 11-3, as well as CDA's organic legislation discussed in the Bank's Memorandum,
11 pp.2-4, for CDA to retain an oversight function in the administration and disbursement of bond
12 proceeds. Such a function is not an infringement upon MPLA's expenditure authority. MPLA has
13 sole authority under the Indenture to initiate a requisition, and to determine compensation.⁶ The
14 apparent reason CDA exercised its power to withhold was not on its face arbitrary or irregular as it
15 concerned the legality of the MPLA disbursement. MPLA "expenditure authority" is logically is
16 expenditure authority consistent with law.
17
18

19 III. The Bank Was Not a State Actor.

20 Kumagai does not dispute the authority submitted by the Bank in support of its contention
21 that it is not a state actor, except with respect to the proximate cause analysis, which she suggests
22 is displaced by the state actor requirement. Opposition Memorandum, p.13. The state actor and
23 proximate cause requirements both must be met to impose liability upon a private party. See,
24
25

26 _____
27 ⁶Kumagai incorrectly characterizes the Bank as ignoring MPLA, Opposition Memorandum, p.17,
28 this is incorrect. Every requisition the Bank processed originated with the MPLA. It even commenced
processing Kumagai's requisition. Carlson Declaration, ¶¶4, 7, 10. What it also took into account was
CDA's instruction to withhold.

1 Franklin v. Fox, 312 F.3d 423 at 444-446 (9th Cir. 2002).

2 **IV. The Bank is Entitled to a Qualified Immunity or Good Faith Defense.**

3 Kumagai asserts that the Bank as a Trustee is not entitled to a good faith defense. Kumagai
4 mixes the availability of a good faith defense in a civil rights action, with the availability of a defense
5 in a claim against a private trustee under Plaintiff's state law claims. As shown above and in the
6 Bank's Memorandum the Bank is not a trustee with respect to Plaintiff under the Indenture. Even
7 if a trustee, its liabilities may be limited by the terms and provisions of the trust as exculpatory
8 provisions in a trust are valid, if not contrary to public policy. Restatement of Trusts 2d, §201, cmt.
9 (d), §222. The Indenture in this case provides:

10
11
12 Neither the Trustee nor the Paying Agent shall be liable in connection
13 with the performance of its duties hereunder, except for its own
negligence or willful misconduct.

14 Indenture of Trust, Section 6.02.

15
16 . . . Trustee and the Paying Agent shall be protected in acting upon
17 any notice, resolution, request, consent, order, certificate, report,
18 Bond or other paper or document believed by it to be genuine and to
have been signed or presented by the proper party or parties.

19 Indenture of Trust, Section 6.03.

20 For all the reasons set out in the Bank's Memorandum, pp. 15-21, either a qualified immunity,
21 or good faith defense should be held available to and established as to the Bank on the civil rights
22 claims in this case. In Ace Beverage Company v. Lockheed Information Management Services,
23 144 F.3d 1218 (9th Cir. 1998), the court recognized the "close supervision" exception in Richardson
24 but held it inapplicable on the facts. In that case public functions of parking ticket administration
25 had been largely delegated to a private entity with large discretion and the government only
26 monitoring performance and setting policy. No similar broad discretionary functions were granted
27
28

1 to the Bank in this case. It disbursed or withheld funds based upon specific government direction.⁷

2 **V. Section 1985(3) Claim.**

3 While citing this court's decision in Ahmed et al. v. Goldberg, Civil Action No. 00-0005 and
4 99-0046, Kumagai fails to show evidence of a Section 1985(3) claim consistent with the
5 requirements of that decision, including that allegations of conspiracy must be factually specific and
6 the requirement that there must be some race or otherwise class based invidious discriminatory
7 animus behind the alleged conspirator's actions. See, Decision and Order Ahmed et al. v. Goldberg,
8 pp.15-17.

9 **VI. State Law Conspiracy Claims.**

10 In response to the Bank's contention that no CNMI Tort for civil conspiracy exists, Kumagai
11 refers to Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), a
12 Supreme Court case concerning conspiracy under Section 1983. Kumagai mixes constitutional and
13 local law conspiracy claims and still fails to demonstrate the existence of any local law conspiracy
14 cause of action, or that one exists against Bank of Guam. Further, Kumagai fails to provide any
15 evidence from which any inference can be drawn of an "understanding" between Bank and any other
16 party to deprive Plaintiff of her rights contrary to the implication in Kumagai's argument.

17 **VII. Intentional Interference with the Contract Rights and Economic Relations.**

18 Kumagai does not respond to Bank's arguments on this claim other than to assert in response
19 to footnote 6, page 23, of Bank of Guam's Memorandum, that MPLA entered into the Land
20 Compensation Settlement Agreement with Plaintiff on its own account and not on behalf of
21 Defendant CNMI, and accordingly that a "third person" did exist so as to support a contractual

22 ⁷While the Act Beverage suggests that the close supervision exception may be inapplicable to an
23 entity as opposed to an individual, the Fifth and Third Circuits hold the exception applicable to entities as
24 well as individuals in Bartell v. Lohiser, 215 F.3d 550 (6th Cir. 2000), and Rosewood Services Inc. v.
25 Sunflower Diversified Services, Inc., 413 F.3d 1163 (10th Cir. 2005).

1 interference claim. The Agreement itself, Exhibit D to Plaintiff's Complaint, clearly shows that
2 MPLA did enter into the Agreement on behalf of the CNMI. See, Complaint, Ex.D, Article 2,
3 stating that MPLA "on behalf of the Commonwealth" agrees to make payment to Plaintiff. See, also,
4 Ex.D, p.1, first through "Whereas" clauses, and Articles 3, 4, and 5. The Agreement was entered
5 into to compensate Plaintiff for a taking in 1993 evidenced by two documents attached together as
6 Exhibit A to the Complaint, neither issued by MPLA.

8 **VIII. Intentional and Negligent Infliction of Emotional Distress.**

9 Plaintiff Kumagai's Declaration provides some evidence of distress, but does not address
10 other elements of an infliction of emotional distress claim which are that the conduct of the party
11 against it asserted must be outrageous, intentional, or reckless. See, Bank's Memorandum, pp.24-25.
12 The Bank acted reasonably in respect to its obligations under the Indenture, which were to the CDA
13 and the Commonwealth, and did not act outrageously, recklessly, or negligently as to Mrs. Kumagai.
14

15 **CONCLUSION**

16 For all the above reasons the Bank's Motion for Summary Judgment should be granted.

17 Dated: 6/26/06.

18 **ARRIOLA, COWAN & ARRIOLA**
19 Attorneys for Defendant BANK OF GUAM

20 By: Mark E. Cowan

21 **MARK E. COWAN**